Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-201

CITY OF RICHMOND, VIRGINIA, *Appellant*,

v.

UNITED STATES OF AMERICA and WILLIAM B. SAXBE, Attorney General, and CURTIS HOLT, SR., *et al.* and CRUSADE FOR VOTERS OF RICHMOND, *et al.*, *Appellees*.

**On Appeal from the United States District Court for the District of Columbia**

## MOTION TO AFFIRM

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## MOTION TO AFFIRM

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Appellees, Crusade for Voters of Richmond, *et al.*, move that the Supreme Court of the United States affirm the judgment of the United States District Court for the District of Columbia entered on June 6, 1974, denying Appellant's request for declaratory judgment. They submit this Motion to show that it is manifest that

the questions on which the decision of the cause depends are so insubstantial as not to need further argument. This case involves the violation and attempted frustration of the Voting Rights Act of 1965 by the City of Richmond since January 1, 1970.

## OPINION BELOW

The opinion of the District Court for the District of Columbia is reported at 376 F. Supp. 1344. Copies of the judgment and opinion of the District Court, and the Findings of Fact and Conclusions of Law of the Special Master appointed by the District Court are attached to the Jurisdictional Statement of the Appellant.

## JURISDICTION

This suit was brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c (1970), on a request for declaratory judgment. The judgment of the District Court was entered on June 6, 1974. Notice of appeal was filed in that Court on July 15, 1974. The jurisdiction of this Court to review this decision by direct appeal is conferred by 42 U.S.C. § 1973c (1970).

## QUESTION PRESENTED

Whether the Appellant has raised any substantial questions with regard to issues on which the determination of this cause depends.

## STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, as amended by Act of June 22, 1970, 84 Stat. 315, 42 U.S.C. § 1973c (1970), is set forth in the Appendix to Apellant's Jurisdictional Statement.



## STATEMENT

The Appellees accept the Appellant's Statement with the exceptions and amplifications set forth below:

The white officials of the City of Richmond entered into the agreement compromising the suit for the annexation of a part of Chesterfield County because they were afraid that black voters would gain control of the City Council at the next election. Their sole concerns in entering into the compromise agreement were to gain a sufficient number of white voters to keep the blacks from gaining control and that the annexation become effective January 1, 1970 so that the additional white voters could vote in the next councilmanic election. Thecompromise was negotiated in secret meetings from which black leaders were systematically excluded. Once the compromise was agreed upon, the annexation case was rapidly concluded.

The pre-annexation population of the City was 202,359. Of these, 104,207 (52%) were black and 98,152 (48%) were white. The annexation added 47,232 people of whom 1,557 were black and 45,705 were white. After annexation, the population of the City of Richmond was approximately 58 per cent white and42 per cent black.

The City of Richmond put the annexation, and the voting changes which were the purpose and effect thereof, into effect without first complying with the Votng Rights Act. The City then held an election in violtion of the Voting Rights Act. The controlling white citizens organization retained control of the City Council in that election.

This suit was filed a few days before a hearing on the motion for summary judgment by the plaintiff in

*Holt II*. The plaintiff in that suit sought an order prohibiting the City of Richmond from continuing to enforce its illegally implemented change in voting practice and procedure. The grounds for that suit were that the City had not complied with the Voting Rights Act by obtaining the requisite approval either from the Attorney General or from the District Court for the District of Columbia. The Court in *Holt II* has not acted during the pendency of this action.

The ward plan adopted by the City of Richmond was drawn without any attempt to minimize the dilution of black voting rights which had been caused by the annexation. It contained five wards in which the white voting age population was greater than 60 per cent and only three wards in which black interests were reasonably sure of prevailing. The plan was adopted and presented by the white political leadership for the purpose of maintaining the dilution of the black vote produced by the annexation. A ward plan introduced by the Crusade for Voters of Richmond during the trial showed that it is possible to effectively minimize the dilution caused by the annexation but that the City had failed to do so.

The City failed to present the substantial evidence available to it which would have demonstrated the benefits flowing to the City from the particular annexation accomplished pursuant to the compromise.[1] Therefore, the District Court properly found that the City had failed to prove that it had a valid purpose for that

[1] The case study prepared by the Urban Institute and referred to in Appellant's Statement was not offered in evidence nor did Appellant call its authors as witnesses even though it is reported to have had such persons standing by in the Courthouse during the trial.



annexation. In the absence of such evidence and in the light of evidence that the City was still pursuing the improper purpose which had motivated the compromise annexation, the District Court concluded that the City of Richmond had not carried its burden of proof under the Voting Rights Act.

## THE QUESTIONS RAISED BY THE APPELLANT, CITY OF RICHMOND, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

The City of Richmond violated the Voting Rights Act of 1965 by attempting to put into effect a change in voting practice or procedure without first obtaining either the consent of the Attorney General or a declaratory judgment from a three-judge District Court for the District of Columbia to the effect that the change had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. The change in question was the annexation of a portion of Chesterfield County. After holding an illegal election in which voters from the annexed territory helped elect a city council, the City of Richmond reluctantly sought the approval required by the Voting Rights Act. The Attorney General denied the request of the City and the City brought this action in the District Court for the District of Columbia. The decision of the District Court below was that the City failed to show that its 1970 annexation, as modified by a nine-ward plan, had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. That decision resolved against the City, which has not held a legal councilmanic election since 1968, the question of whether residents of the annexed area can vote in City elections. That question having been resolved against the City, and the City not having asked the

Court below to approve an annexation modified by a different, less discriminatory nine-ward plan, the City must now surrender the illegally annexed territory and hold an at-large election within the old City boundaries. An action is pending before the District Court for the Eastern Division of Virginia in which the Plaintiff, Curtis Holt, one of the intervenors in this action, seeks an order enjoining the City from continuing to exercise control over the annexed area. The only real question in that action is how soon the City should be ordered to surrender the annexed territory in the face of the decision of the District Court for the District of Columbia. If the decision of the District Court is summarily affirmed by this Court, there can be no reason for the City to delay and the District Court for the Eastern District of Virginia should have no difficulty in reaching a decision. The "procedural morass" which the City has created by its efforts to evade its legal duties and about which it now complains will have evaporated. It will be clear to any other city that may attempt to effectuate an illegal annexation that such an effort must fail.[2] The points raised by the City are clearly of so little merit that no further argument is needed and the judgment below should be affirmed.

**1. The District Court Properly Interpreted and Applied Section 5 of the Voting Rights Act.**

This is an action in which the City of Richmond seeks a declaratory judgment that its annexation, as modified by a nine-ward plan, was not improperly

[2] As of September 10, 1973, the Attorney General had entered objections to only 5 of the 705 annexations which had been submitted to him pursuant to the Voting Rights Act. The typical annexation has been submitted for clearance prior to implementation and has been found unobjectionable.



motivated and did not have an impermissible effect. As the plaintiff in a Voting Rights Act suit, the City of Richmond bears the burden of proof. Voting Rights Act § 5, 42 U.S.C. § 1973c (1970); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 335; *Georgia* v. *United States,* 411 U.S. 526, 539. The District Court found that the City had not carried its burden with regard to either of the two propositions which it must prove. In reaching that ultimate finding, the Court examined the evidence, reviewed the history of the annexation in question, and adopted the largely undisputed findings of the Special Master whom it appointed to hear evidence.

The Court found that the City effectuated the basic annexation for an improper purpose and then illegally implemented it in violation of the Voting Rights Act. *Perkins* v. *Matthews,* 400 U.S. 379 (1971). The Court concluded that, given those facts, the City could not convince the Court that it had purged itself of its original discriminatory purpose unless it could demonstrate by substantial evidence "(1) that the ward plan not only reduced, but also effectively eliminated, the dilution of black voting power caused by the annexation and (2) that the city has some objectively verifiable, legitimate purpose for annexation." Appellant's Appendix, Page 20b. This was a reasonable requirement in light of the demonstrated purpose of the original annexation. That is, given the original intent of the City in effectuating the annexation, the Court naturally asked for more than mere empty words from the City. If the City did, in fact, have some valid, permissible reason for seeking approval of the annexation as modified, it should have been able to demonstrate it. Similarly, if the City sincerely wanted the annexation for valid, non-racial purposes, it would have undone the wrong which the annexation was intended to and

did accomplish. To require any less of the City would have been to condone its original illegal act.

The City failed to make either of the two showings sought by the Court. Although the intervenor Holt presented evidence which tended to show that the particular annexation in question hurt rather than helped the City economically, the City presented no evidence with regard to the alleged benefits to the City from the annexation. In the absence of evidence of such benefits, the Court could only conclude as did Judge Butzner in his dissent in *Holt I*, that there were no such benefits. *Holt* v. *City of Richmond,* 459 F.2d 1093, 1105-1106 [3] (4th Cir., 1972) *cert. denied* 408 U.S. 931.

With regard to the second showing which the City failed to make, the City's own witness, Mr. Oslin, testified that the ward plan adopted by the City was prepared without regard to the dilution of black voting strength caused by the annexation. Moreover, the evidence showed that the City's ward plan would result in a continued dilution of black voting strength when compared with an at-large system within the old boundaries of the City. The City's ward plan would have resulted in, at best, the election of only four City Councilmen who could be expected to represent black interests. The City further evidenced its lack of a true interest in eliminating the dilution of black voting strength when it completely ignored and attacked the ward plan suggested by the Crusade for Voters of Richmond. On the basis of this evidence, the District

[3] Although the Circuit Court reversed the District Court in *Holt I* it did not dispute the factual findings as to the intent of the City leaders in entering into a secret compromise of the annexation suit.



Court had no choice but to find that the City of Richmond had not sustained its burden with regard to showing the absence of any improper purpose.

The City suggests that the District Court has imposed an impossible burden upon it by, in accord with the clear wording of the law, requiring it to show both the absence of an impermissible purpose and the absence of an impermissible effect. In the context of a demonstrated original improper purpose it was reasonable for the Court to require the City to show that it had purged itself of such improper purpose by proving a valid purpose and by proving specific acts in the way of elimination of the results of the improper purpose. If the City had in fact purged itself of the impermissible purpose, it would have had no difficulty in meeting these requirements as was shown by the plan developed by the Crusade for Voters.

**2. The District Court Properly Found That the City Did Not Meet Its Burden of Proving That the Annexation Was Not Motivated by an Illegal Purpose.**

As noted above, the District Court held that Richmond had "the burden of proving that the annexation, as modified by the ward plan, (1) does not have the purpose of abridging black voting power and (2) will not have such an effect." Appellant's Appendix, page 9b. Richmond did not and does not challenge this burden of proof.

The City does, however, contend that the decision of the Fourth Circuit in *Holt I* should, in some unexplained manner, control this action with regard to the purpose of the City in attempting the annexation in question. This ignores the facts that:

1. The burden of proof in *Holt I* was on the plaintiff, Holt, et al., not on the City.

2. In *Holt I* the Court held that legislation, the annexation, which is constitutional on its face may not be stricken under the 15th Amendment because of suspect legislative motivation unless the legislative purpose is both obvious and constitutionally impermissible. The Court held that Holt had not proved that the purpose of the City in annexing a portion of Chesterfield County was both obvious and constitutionally impermissible. That holding has little to do with the question of whether Richmond could prove that the annexation had neither the proscribed purpose nor the proscribed effect.

3. There was evidence before the District Court in this action which was not before the District Court in *Holt I* indicating that the City not only was but still is motivated by an illegal purpose with regard to the annexation.

The case was referred to a Special Master who held a trial on the merits. During that trial, in an effort to conserve time and expense, the parties introduced the trial record from *Holt I*. Accordingly, the Master and the Court had the benefit of the evidence presented during the *Holt I* trial as well as the evidence presented directly to the Master. Based on this mass of evidence, the Master made findings of fact which, as noted by the Court, were generally not challenged by the parties. Those findings amply support the determination that the City did not carry its burden of proof.

The decision of the District Court below is not in conflict with the decision of the Fourth Circuit in *Holt I* because it is based on a different cause of action. The difference in the results reached by the two courts on the basis of similar evidence does, however, illustrate



that the Voting Rights Act is working as Congress intended. This Court discussed that intent in *South Carolina* v. *Katzenbach, supra,* at 328:

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

Although the City has proved itself a master of using obstructionist tactics even today, the Voting Rights Act has been vindicated by the decision of the District Court in this action. The essence of the City's appeal in this case is that it does not like the Voting Rights Act. The effect and constitutionality of that act are now well settled.

### 3. The District Court Properly Claimed But Did Not Exercise Authority To Effect De-annexation.

The Voting Rights Act required the City of Richmond to obtain approval of the annexation in question before implementing it. The City ignored this requirement and now complains because the Court indicated that it could, although it did not actually do so, frustrate this illegal action by ordering that the City surrender the annexed territory. The position of the City seems to be that the Court lacks authority to implement the congressional policy underlying the Voting Rights Act. Although the Court clearly does have such authority, its statements in this regard were only dicta. In fact, the Court, out of respect for and

comity with the District Court for the Eastern District of Virginia, refrained from exercising such authority.[4] The Court entered no order in this regard from which the City can appeal.

**4. In Determining Whether the City Had Met Its Burden of Proof the Court Properly Inquired as to the Possible Benefits of the Annexation.**

As discussed above, the City of Richmond had the burden of proving that the annexation, as modified by its nine-ward plan, was not improperly motivated. Since it was established that the original annexation was improperly motivated, the City had to show that it had purged itself of such improper purpose. The Court recognized that it is difficult to directly prove a negative but quite feasible to prove a negative indirectly by establishing the opposite of the negative. Accordingly, the Court required Richmond to prove the existence of a valid purpose for the annexation. That is, the only possible reason for continuing the annexation apart from improper racial purposes would be the existence of some sort of economic or administrative benefits flowing from the annexation. In the absence of proof of such a valid purpose the Court could only conclude that the improper purpose still controlled.

The City of Richmond claims that the duly constituted Virginia annexation court is the only proper

[4] The exercise of such authority should not produce the difficulties which the City predicts. The territory in question was efficiently transferred from Chesterfield County to the City of Richmond in 1970. There is no reason why a retransfer should produce even as many problems as the original transfer. The Special Master found that Chesterfield County is ready, willing and eager to reassume jurisdiction over the annexed territory.



forum for determining whether the annexation is beneficial. This ignores the fact that the annexation in question was the product of a compromise agreement submitted to the Court in an off-the-record chambers conference. As pointed out by Judge Butzner dissenting in *Holt I*, "Virginia's annexation laws, though fair on their face, were deliberately used to debase the votes of the black citizens of Richmond." 459 F.2d at 1100. The annexation in question, rather than the annexation originally proposed by the City of Richmond, has never been shown to be beneficial to the City of Richmond. If the annexation is in fact of benefit to the City, the City should have no difficulty in establishing such fact. This is particularly true in light of the four and one-half years of experience which this city has had in governing the illegally annexed territory. The complete failure of the City to present such evidence suggests that the annexation may, in fact, not be of benefit to the City. Since the City is presently controlled by the same group of men who entered into the compromise annexation in order to keep blacks from gaining control of the City Government, if no valid purpose for continuing the annexation can be shown, it is reasonable to assume that those men wish to continue the annexation for the same invalid purpose.

**5. The Judgment of the District Court Was Based Upon the Evidence Before It Rather Than on the Contentions of the Parties.**

The City of Richmond initially asked the Attorney General to declare that the annexation had neither the proscribed purpose nor the proscribed effect. The Attorney General could not, and did not, so declare. The City then petitioned the District Court for a

declaratory judgment to such effect. During the pendency of this action the City amended its complaint to ask that the annexation, as modified by a ward plan, had neither the proscribed purpose nor the proscribed effect. The Attorney General then, in his status *as a party* to the action, indicated that he did not oppose such a declaration. The other parties to the action, however, the Crusade for Voters of Richmond and Holt, did object. The Court properly resolved the conflict among the parties by holding a trial on the merits and entering a decision based upon the evidence received at the trial. The position of the City is that the Court should have ignored the evidence and the contentions of two of the parties and entered judgment for the City merely because the Attorney General, *as a party* to this action, did not object to the amended relief sought by the City. That would have been clear error. Actions must be decided on the facts, not merely on the unsupported allegations of the parties.

**6. Holt I Involved a Different Cause of Action and Therefore Was Not Entitled to Either Res Judicata or Collateral Estoppel Effect.**

The City of Richmond contends that the decision of the Fourth Circuit in *Holt I* is entitled to either *res judicata* or collateral estoppel effect in this action. The City errs in this contention because *Holt I* involved a different cause of action and different elements of proof than does the instant case. As the Supreme Court pointed out in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326, relied upon by the City, "Under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based upon the same cause of action." The Fourth Circuit itself recognized that an



action under the Voting Rights Act involves a different cause of action than did *Holt I:*

> We have no jurisdiction to consider any problem arising under that act, and what we have said reflects no opinion as to the appropriateness or inappropriateness of the Attorney General's objection. 459 F.2d 1093, 1100.

In addition to being a different cause of action, two of the parties in the instant case were not party to, or in privity with parties to, the *Holt I* action. Therefore, *res judicata* cannot apply.

The doctrine of collateral estoppel is not applicable because the issue before the District Court in this action involved different legal rules and a different burden of proof than did *Holt I* under the decision of the Fourth Circuit. The limitations of the doctrine of collateral estoppel have been developed by the courts in cases involving tax fraud. In *Neaderland* v. *Commissioner,* 424 F.2d 639, 642 (2nd Cir., 1970), *cert. denied,* 400 U.S. 827, the Court discussed collateral estoppel:

> This doctrine has been developed by the judiciary as a "reasonable measure calculated to save individuals and courts from the waste and burden of re-litigating old issues." * * * Collateral estoppel is confined, however, to "situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." * * * Even if the issue is identical and facts remain constant, the adjudication of the first case does not stop the parties in the second, unless the matter raised in the second case involves substantially "the same bundle of legal principles that contributed to the rendering of the first judgment." [Citations Omitted]

The court held, following *Helvering* v. *Mitchell,* 303 U.S. 391, that the acquittal of a taxpayer on charges of criminal tax fraud would not bar the government from later proving, in a civil action, that the taxpayer had committed fraud. The court stated,

> "When a jury acquits, it decides only that an accused is not proven guilty of the offense charged beyond a reasonable doubt, and the Commissioner is not foreclosed thereby from attempting to show fraud in the civil counterpart against the same defendant by a fair preponderance of the evidence. *Helvering* v. *Mitchell, supra,* 303 U.S. 397, 398, 58 S. Ct. 630. This burden of proof factor alone is sufficient to demonstrate that the "bundle of legal principles" applicable in a civil suit differs significantly from that in a criminal trial. 424 F.2d at 642.

As pointed out above, the decision in *Holt I* was based upon a finding that the plaintiff had not proved that the purpose underlying the annexation was obviously constitutionally impermissible. Under the Voting Rights Act the burden of proof is on the City and the issue is whether the City can prove that it did not have the proscribed purpose in undertaking the annexation and that the annexation did not have the proscribed effect. Thus both the burden of proof and the legal issues are different in this case from what they were in *Holt I.* The doctrine of collateral estoppel is not applicable.

**7. The District Court Properly Found That the Effect of the Annexation in Question Was To Deny the Right To Vote on Account of Race.**

The City of Richmond asked the District Court to declare that the annexation of a portion of Chesterfield County, as modified by a particular nine-ward plan, did



not have the effect of denying or abridging the right to vote on account of race or color. The City conceded that the annexation had the effect of diluting the black vote but contended that its adoption of the nine-ward plan avoided the dilutive effect of the annexation. The District Court indicated, following *City of Petersburg, Va.* v. *United States,* 354 F. Supp. 1021, 1024 (1972), *affirmed,* 410 U.S. 962, that if the City changed from an at-large system for electing its City Council to a ward system "calculated to neutralize to the extent possible any adverse effect upon the political participation of black voters" the annexation could be approved. The District Court found, however, that the evidence showed that the plan adopted by the City did not so neutralize the effect of the annexation. Although there was ample evidence on which the Court could reach such a conclusion, two facts in particular compelled it: First, the City did not even attempt to minimize dilution in drawing its plan. Second, the Intervenor, Crusade for Voters of Richmond, presented a plan which involved far less dilution of the black vote than did the City's plan.

Contrary to the assertion of the City, the District Court did not hold that any annexation which has a dilutive effect on black voting rights must be prohibited. It did hold, however, that concrete facts rather than empty words must be presented before an annexation which has the initial effect of diluting black votes can be declared to not have the effect of denying or abridging the right to vote on account of race. The City of Richmond did not present such facts.

## CONCLUSION

The District Court correctly interpreted and applied the Voting Rights Act. Although it could have ordered elections immediately it did not err when, out of comity for the Eastern District of Virginia, it refrained from entering such an order. The City has not presented any substantial question. The decision of the District Court should be affirmed.

Respectfully submitted,

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